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COMPETENCY IN FEDERAL COURTS OF WIFE IN PROSECUTION AGAINST HUSBAND UNDER WHITE SLAVE ACT.

In Denning v. United States, 247 Fed. 163, the Fifth Circuit Court of Appeals holds that a wife is a competent witness in a prosecution in a federal district court against a husband under the White Slave Act, notwithstanding that the law of the state where the prosecution is pending forbids her to testify against the husband except in cases involving physical violence to her person.

As to the district court being bound by the Texas rule, the Court says: "It is perfectly clear, from the decisions of the Supreme Court of the United States, that state statutes regulating the admission of testimony in criminal cases have no application to the trial of such cases in federal courts," citing U. S. v. Reid, 12 How. 361; U. S. v. Logan, 144 U. S. 263. This we believe to be true upon the ground that the rule in criminal cases did not come within the conformity section of the judiciary act, but was under the judiciary act of 1789, which, as said in the Reid case, referred federal courts to the common law.

In Rosen v. U. S., 38 U. S. 148, 86 C. L. J. 95, it was held that incompetency of a witness in a criminal case, under state law, because of conviction for forgery, did not fix his status in a prosecution in a federal court, sitting in the state.

There also the Supreme Court further held, that the "dead hand of the common law rule" embodied in the judiciary act of 1789 was no longer to be respected, because of "the very great weight of judicial authority developed in support" of a modern rule which permits "hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent." It is said that "this principle has come to be widely, almost universally, accepted in this country and in Great Britain."

The rule making the husband and wife incompetent as witnesses for or against each other must be carefully distinguished from the rule which regards certain communications between them as confidential and therefore privileged. The two rules rest on different grounds. The first rule is grounded on the common law idea of the unity of the marital relation, while the other is supported on reasons of public policy. There is no tendency observable in the modern cases to disturb the latter rule while the former is generally regarded as existing simply as an ancient and honorable heirloom of the common law that the courts hesitate to discard.

Historically, there seems to be little authority for declaring, as some courts have done, that the rule making husband and wife incompetent to testify for on against each other rests upon any grounds of public policy. There can hardly be said to be any interests of justice or of the marital relation to be served by prohibiting either spouse to testify for or against the other where such testimony does not seek to disclose any confidential communication received one from the other.

Blackstone himself conceded that the rule of incompetency rested solely on the old common law rule which excluded witnesses from testifying who were interested in the result. The learned commentator says:

"But in trials of any sort, they are not allowed to be evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of the person; and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, *'nemo in propria causa testis esse debet;'* and if

against each other, they would contradict another maxim, *'nemo tenetur seipsum accusare.'"*

Witnesses are no longer excluded on the ground of interest; and the statutes which have abolished this disqualification, have necessarily left the rule excluding husband and wife as witnesses for or against each other without much support.

If the common law rule as to the incompetency of husband or wife for each other had any other basis than interest in the result of the trial because of the unity of the relation, why was it that even at common law in proceedings where neither was a party in interest, husband or wife could testify even if such testimony "tended to criminate the other, or to subject the other to a legal demand." (Jones Ev., 1912, p. 927.) This is not the case with respect to the rule as to confidential communications which operates in collateral proceedings, as well as in proceedings where either spouse is a party in interest.

It is also to be observed in this connection that where the statute removes interest as a disqualification, a wife may testify for or against her husband provided she is also a party of record and in interest.

The particular result of the decision in the principal case is merely to enlarge a well recognized exception to the general rule at common law, that either spouse could testify for or against the other in proceedings based on a personal injury committed by one spouse upon the other. The point in controversy, and upon which some of the authorities are in conflict, was whether a prosecution against a husband for inducing his wife to go from state to state for purposes of prostitution is a proceeding "based on a personal injury inflicted by the husband upon the wife." While strictly speaking, this case could hardly be said to come within the old common law exception, yet as the court intimates, under the more liberal tendency of the recent cases to get away from a rule which seems to have so little to support it, the application of the general common law exception to the facts in the principal case, seems to be amply justified.

There can be no doubt that ultimately our courts will come to the same sane conclusion, as the English courts have done, that since interest no longer disqualifies a witness, a husband or wife may testify even in cases where the other spouse is a party, except as to confidential communications made to each other during the marriage. A. H. R.

NOTES OF IMPORTANT DECISIONS.

INTERNATIONAL LAW — WAIVER OF SOVEREIGNTY BY FOREIGN GOVERNMENT BY BRINGING SUIT.—In 85 Cent. L. J., 369, we noticed a decision by District Court, Northern District of New York, and we criticised the ruling therein. This decision has been reversed by Second Circuit Court of Appeals. Kingdom of Roumania v. Guaranty Trust Co., 247 Fed. (Not yet reported.)

The facts show that one Arditi began an action against the Guaranty Trust Co. and the Kingdom of Roumania, in a claim against the latter for breach of contract and to impress a lien upon funds of the latter in possession of the former. The Kingdom brought suit against the Trust Company to recover an alleged balance in its hands upon a credit alleged to be due the Kingdom. The district court, while admitting the immunity of this Sovereign Kingdom from suit, claimed that the immunity had been waived by its resort to the courts of this country to enforce its alleged rights against the Trust Company and that this waiver was general in its effect and as to everybody.

The Circuit Court of Appeals, after citing several cases decided by U. S. Supreme Court showing waiver of immunity from suit said:

"These authorities arose on quite a different state of facts. In the present case there is no specific fund. The relation between the Kingdom of Roumania and the Guarantee Trust Company being the usual one of debtor and creditor existing between banks and depositors, we are clear that the action by the Kingdom of Roumania to recover a debt owed it by the Guarantee Trust Company was not a waiver of its immunity as a sovereign to be sued by other parties. If this be not so the immunity

can be frittered away either by interpleader or attachment in any case where a foreign government undertakes to collect a debt owed it."

In the cases cited there were suits against officers of a sovereignty touching specific funds and the sovereignty put itself into the case by its own intervention. In the instant case, however, it was brought in by a third person for his own purposes. But even in a case regarding a specific fund it was said that the sovereignty had solemnly appeared and answered plaintiff's complaint and, therefore, was estopped to deny the court's jurisdiction. If a foreign sovereignty has any right to invoke jurisdiction at all, that it does so penalizes it in no way so far as third persons are concerned. An estoppel of the nature claimed would be to subject a sovereignty to a consequence it cannot possibly anticipate and in itself confers a right so attenuated in nature as to have no real existence in fact.

INTERNATIONAL LAW—RECOURSE BY OWNER OF PROPERTY APPROPRIATED BY REVOLUTIONARY LEADER.—In Oetjen v. Central Leather Co., 38 Sup. Ct. 309, decided by U. S. Supreme Court there was involved the question of title acquired by defendant to property seized by a revolutionary leader in Mexico and by him sold to defendant. It was held that when a government originating in revolution is recognized by the political department of this country as its *de jure* government, the purchaser of property so seized and sold receives so far as the courts of this country are concerned a valid title as against an assignee of the owner, such recognition being retroactive so as to validate the actions of such leader.

The court goes into a review of the political conditions in Mexico from the time of the assumption of the office of president by Huerta, along through the revolution inaugurated by Carranza and his commissioning of Villa as one of his generals and the final success and recognition of the government thus inaugurated.

The property in question was sold to pay an assessment made by order of Gen. Villa and defendant became its purchaser.

It was said by the court that this being property at the time of seizure and sale belonging to a citizen of Mexico, and being taken by a duly commissioned military commander in the progress of a revolution, it is to be regarded as a military contribution and such seizure and sale is not the subject of re-examination and modification by the courts of this country.

"The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based on acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"

In a companion case decided by U. S. Supreme Court on the same day it was held that where property seized and sold as aforesaid belonged to an American citizen, who was neither in Mexico nor a resident in that country, the principle above stated applied in the same way. His remedy, if any, must be determined by the courts of Mexico or through the political departments of this country. Ricaud v. American Co., Ltd., 38 Sup. Ct.

The principle acted on in both cases appears to us undoubted and indisputable.

DIVORCE—INDIGNITIES AS CONSTITUTING CRUEL AND ABUSIVE TREATMENT.—In Armstrong v. Armstrong, 118 N. E. 916, decided by Supreme Judicial Court of Massachusetts, it is held that where cruel and abusive treatment is a ground for divorce, neither words nor acts not involving physical injury, though causing unhappiness and loss of health, are proof of cruel and abusive treatment, unless they were uttered or committed with malicious intent to injure.

The court said: "The spouse may be guilty of drunkenness or other vices; his habits or disposition, his indifference, neglect or desertion, may cause mental worry and injury to health, but these acts, standing by themselves are not enough to make out a case of cruel and abusive treatment * * * unless it is shown that the language was uttered or these acts were committed with a malicious intent and for the purpose of injuring the libellant."

In this case the wife testified that the husband "stayed away longer than he ever had in four years and went out many evenings;" that when she spoke to him about this he said: "he had been going with a girl in Boston"; that "she expostulated with him and told him of her suffering," and he said he could not give up the girl, and she became worried and sick and has not completely recovered her

health. There was a finding that the wife lacked no attention during sickness and the impairment of her health was because his affections had been alienated. There also was proof of a disgusting act by the husband in his wife's presence and this was held contributory to her ill health.

Defining the term cruelty in divorce statutes has always been difficult for the courts, since in almost every state courts have limited the term to its common law meaning and no authoritative or accurate definition was ever made by the ecclestical courts. And, moreover, like the term, fraud, it is a word inherently incapable of definition since it comprises in its scope, the incalculable depths of infamy to which human ingenuity may descend.

It is easier, therefore, to say what does not constitute cruelty than to declare what does. Probably no better affirmative rule could be adopted than that laid down in the principal case. At any rate since men and women are not perfect and since the law does not attempt the impossible, cruelty should not be held to consist in any sum of vices and misadventures in which both men and women are likely to fall, and which are not the product of a studied and malicious attempt of one spouse to bring injury upon the other.

SALES AND DELIVERIES OF ARTICLES IN INTERSTATE COMMERCE LOSING OR RETAINING THEIR INTERSTATE CHARACTER.

Introductory. The shipment of oil in bulk and of gas in pipes has caused some recent discussion among courts in respect to the original package ruling and the breaking of bulk in sales. In this article the cases are cited relative thereto and especially recent cases as to distribution of gas by means of facilities controlled by public service commissions.

Breaking Original Package.—It must be conceded, that supplying a customer in another state with an article as part of a mass from which other customers are to be supplied, does not amount to a breaking up of the mass so as to bring the sale under local control. Thus the Supreme Court in a very late case ruled that, where a foreign corporation shipped into a state a tank car of oil from one exterior point and a car load of barrels from another exterior point, so as to fill orders taken by a traveling salesman, the sale and delivery to the customers severally constituted no breaking of the bulk so as to make either or any of the transactions local in character.[1]

A Tennessee case,[2] referred to approvingly in the Lipscomb case, *supra,* many bulk shipment cases decided by U. S. Supreme Court, in which different purchasers already contracted with to be supplied, deduce the conclusion, that an oil company, shipping a tank car of oil, could fill separate contracts for oil from the mass conveyed, as protected transactions under the commerce clause.

The breaking of bulk or package so as to bring sales therefrom under local law must be in a state where a sale is made and without authority by the seller in the foreign state. Thus where a portrait company shipped pictures and frames from Chicago on orders solicited in North Carolina, the shipping of the pictures in one or more packages and the frames in another or other packages, "the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent at Greensboro, (N. C.), who delivered them to the purchasers, does not deprive the transaction of its character as interstate commerce. It may be only that the vendor used two instead of one agency in the delivery.[3] And it was held that where brooms had been sold on solicited orders, the fact that they were tied in bundles and tagged and marked only according to the number ordered, making delivery to different customers from

(1) Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. ed. 1181.

(2) Western Oil Refining Co. v. Dalton, 131 Tenn. 329, 174 S. W. 1138.

(3) Caldwell v. North Carolina, 187 U. S. 622, 33 Sup. Ct. 229, 47 L. ed. 336.

the bundles did not make a breaking of the bulk local transactions.[4]

Article at Rest in State So as to be Withdrawn from Interstate Commerce.—But though a shipment be made in interstate commerce, yet it may become subject to local law if there is such interruption in its transit before reaching a point for delivery, as may make it subject to local regulation. Thus the Supreme Court held,[5] that where a domestic corporation having its plants for the manufacture of oil in Pennsylvania and Ohio, transportated oil in tanks to itself or consignee in Memphis for the purpose of distribution in smaller vessels for the filling of orders for customers in Arkansas, Louisiana and Misissippi, it came to rest in Tennessee so as to be subject to state law. Said the court: "It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required a storage there —the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary—a purpose outside of the mere transportation of oil."

Two of the bench, Justices Moody and Holmes, dissented from this view on the ground that as the oil had been sold before starting on its journey and was stopped "only momentarily for the purpose of repacking and reshipping it," that "the delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. * * * It would no more seem to be the subject of taxation than a drove of cattle, whose long interstate journey was interrupted for humane reason, to give them a few days of rest and refreshment." The dissent also pointed out that this case was readily distinguishable from a former case,[6] where articles shipped in interstate commerce came into a state, were placed in a warehouse for sale and from there sold to persons within as well as without the state.

The Crenshaw case, *supra,* and in a later case,[7] in both of which state rulings were reversed, it was held, that delivery to customers by draymen employed by consignors of goods not identified as separately set apart, but selected from the mass by checking from original orders, did not come under the rule of "rest" as declared in the Crain case, *supra.* The Tennessee Supreme Court in the Dalton case, *supra,* expressed its regret that the Cranshaw and Stewart cases did not speak more "pointedly touching the test conceived to have been formally applied" by the Supreme Court, to-wit: "the preappropriation of the commodities to respond to the order of the bargaining customer." We discover, however, from the Crain case there may be a "rest" in the state, subjecting to local influence, though this be no more than to arrange for distribution among customers an article shipped in bulk, and though the shipper uses his own storage for this purpose and makes his own segregation for his customers, to whom the article shipped in bulk has been preappropriated. What shall be said, when to accomplish distribution he must rely on means regulated by local authority?

Employing Drays to Assist in Deliveries. —The Stewart case, *supra,* holds that where goods were shipped in carload lots from Chicago to points in Michigan and upon arrival orders therefor were filled by delivery at the car to customers by draymen employed by the shipper, such deliveries were

(4) Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295. See also Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 565.

(5) General Oil Co, v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. ed. 754, affirming S. C. 117 Tenn. 82, 95 S. W. 824, 121 Am. St. Rep. 967.

(6) Am. Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. ed. 538.

(7) Stewart v. Michigan, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. ed. 786.

in interstate commerce, providing such deliveries were on orders previously solicited. There was no stress placed on the fact, that resort was made to drays that had to be licensed by the state, but generally the case was held to come under the rule in the Crenshaw case. That case speaks of ranges shipped being "loaded on delivery wagons and delivered by the delivery men to purchasers in the precise shape, form, condition and packages in which they were delivered to the common carrier" at the point of shipment. But in this case no notice was taken of this feature. It may be that there was no need to notice this feature, because licensing of drayman is regarded merely as a revenue law, and is not intended to preclude draymen getting business from whomsoever may see fit to employ them. At all events no point was made as to their employment in this way, as being the using of a facility under control of the local jurisdiction. It is to be thought, however, that had the state expressly provided, that draymen delivering interstate articles only should be required to pay a license the same as where they were engaged in other work the statute would be valid, provided no discrimination be made against such articles in their charges.

Using Facilities Authorized by Local Franchise.—Suppose, however, that a foreign corporation sends goods sold in interstate commerce to a destination and there it is necessary to resort to means in franchise for their delivery to customers? There is a possibility that a seller using a pipe line for the transportation of water, oil or gas, might need for complete delivery to its customers the use of conveyors in the streets of a muncipality? Can it be supposed that the commerce clause meant so far to interfere with domestic arrangements as to commandeer them for the benefit of interstate commerce in effecting delivery of articles sold therein? Is it not enough to preclude local regulations from discriminating against such articles? Naturally it would seem sufficient for congress to require, that from the agency lawfully used in transportation, delivery may be effected without any discrimination in the use of other necessary means in the effecting of complete delivery. If residents may freely use these necessary means, so may non-residents, and whether the articles be subject to state law as a part of the mass of things there located or not. But the resident in using these other things may come under a rule or regulation to which these other things are subject.

Correlative Obligation in Use of Franchise.—In a noted insurance case Justice Lamar, in dissent, in speaking of property, devoted to public use, said:[8] "Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had thus been taken by law, fixed by law." While Justice Lamar dissented from the rest of the Court as to this correlative obligation existing as to the business of insurance, there can be no doubt of it so far as regards other businesses. This obligation, however, arises from dedication under legal principle to public use. This dedication is a part of domestic policy. It puts upon property of this kind a new burden. May it not be said that one using it submits himself to this limitation, that he comes into its operation according to state law? If so, that which was before an article in interstate commerce ceases to be such by the will of the owner of the article and is transferred to the mass of things located in the state and subject to its laws.

There is nothing in the cases I have cited above that prevents this conclusion. In them it was claimed that the shipper from another state had done nothing that brought to an end the sway of commerce over the shipment—there had only been a rest in interstate commerce and refinement was in-

(8) German-Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011.

dulged to show whether or not this was true. But to place property where it comes under state regulation, seems to present deliberate acceptance of burden or benefit, according as the act of placing may be viewed. This makes no particular difference. *"Qui sentit commodum, sentire debet et opus."*

Having enunciated these general principles I will discuss two cases disposed of by Supreme Court of Kansas[9] and by the District Court of Kansas,[10] in which the opposing results were reached.

View of Kansas Supreme Court.—This case concerned two natural gas companies in an action by the attorney-general of Kansas for violating the state's anti-trust laws, and praying for ouster and the appointment of a receiver. In the suit receivers were appointed and they asked for an order making the Public Utilities Commission of the state a party defendant. It interposed a demurrer to the jurisdiction of the court, which was sustained by the Supreme Court and the injunction against it was set aside. This permitted the commission to proceed in its duty, as conceived by it, in regulation of the distribution of gas in the state and fixing of the rates therefor.

The court said: "It is contended that the receivers are engaged in interstate commerce, and for that reason are beyond the control of the public utilities commission. That the transportation of natural gas from one state to another is interstate commerce must be conceded. * * * The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. * * * If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual users at retail sale. The gas then becomes mixed with the common mass of property in the state."

I digress here a moment to say, that in none of the cases above referred to, no claim is made that any article was protected beyond delivery to a purchaser secured as such by the seller before it was shipped in interstate commerce, and certainly, not if he resold it, whether in general trade or by any private contract. If this gas did not come into general trade, it was solely because its sale came under state regulation. In federal view in either event the result would seem to be the same.

As to the effect of such regulation this opinion further said: "Before selling natural gas it became necessary to obtain franchises from the several cities under the laws of this state. These laws provided that in certain classes of cities the franchise owners might name the price at which gas should be sold. If the business done by the receivers in this state is interstate commerce and the state has no power to regulate the price at which gas may be sold, the laws providing for fixing rates in franchises were invalid, so far as gas coming from another state is concerned."

It lacks something of being a conclusive argument, that state laws would be invalid by reason of the reach of interstate commerce. But it is legitimate to inquire whether it would be deemed a rest in the transportation of an article in commerce, that the owner thereof submits its sale to state law, because there is no law of congress for its sale after its coming to an alleged rest.

It is urged there is a rest because the commerce clause and acts of congress for

(9) State ex rel. Kaster, v. Landon, 96 Kan. 372, 152 Pac. 22.

(10) Landon v. Pub. U. Coun. of Kansas, 234 Fed. 152; S. C. v. S. C., 245 Fed. 950.

its enforcement are of uniform application throughout the country, but natural gas is not the sort of an article where a uniform law would apply, because of its nature. I am not greatly impressed with this kind of an argument, but it has been urged in an Indiana case.[11] There it was said that: "Natural gas is characteristically and peculiarly a local product, and because of its local characteristics and peculiarities it is a proper subject for state regulation, and cannot, so far as regards local protection, be made the subject of general legislation by congress."

The vice in this argument, as I conceive it, that this is not as concerns its being piped into another state, but as it remains where it is found. But one of the cases cited by the opinion in this case,[12] is to the effect that some occupations and some articles carried on or sold come under state police power. Gas, whether sold in the state where found or sold in another state, conceivably is under the state police power where sold. If it is transported from one state to another, it may come successively under the police power of both states. But, if in transportation it comes to a point where it passes under state police power, though before within the protection of the commerce clause, there is a radical departure from its former state, and this whether or not those to whom it is to be delivered were selected as buyers before shipment was started in the state from which it is being transported.

It has been held that a statute forbidding the transportation of natural gas from one state to another was an interference with interstate commerce,[13] but that does not necessarily embrace the question I am considering. That statute was a general prohibition regarding an article as an article and not with respect to any police power in its movement. I imagine a statute safeguarding its transportation for protective reasons, would be held valid with regard to shipment for interstate as well as local purposes.

The rule declared by this Indiana case has also been held by U. S. Supreme Court,[14] but in that case the Court based its decision solely upon the purpose of a statute to exclude from interstate commerce natural gas as a product, saying "there is no question in the case of the regulating powers of the state over the natural gas within its borders."

A federal case[15] considered the effect of this Supreme Court case on the right of a public service commission to fix the rates for gas transported in interstate commerce. It was said: "We are unable to agree that the fixing of rates to be charged to their customers in West Virginia is an unlawful regulation of interstate commerce. * * * Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia to be charged by corporations operating in West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common system of pipes supplying customers in the three states may produce the result that some from Ohio and Pennsylvania comes into West Virginia. * * * But this interflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs cannot affect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens."

It might be contended, that this act of mingling the products put it into the mass of property in the state, but it seems much more reasonable to say that putting it where

(11) Jamieson v. Indiana Nat. Gas Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.
(12) Crowley v. Christensen, 134 U. S. 86, 34 L. ed. 620.
(13) State ex rel. v. Ind. & O. Oil, etc., Co., 120 Ind. 575, 6 L. R. A. 579.
(14) West v. Kansas Nat. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193.
(15) Manfrs. Light & Heat Co. v. Ott, 215 Fed. 940.

it became subject to state regulation is the decisive factor. If it was for indiscriminate distribution to whomsoever might apply, this would show that customers by contract prior to its transportation were not regarded. If the cases considered in the first part of this article went to pains to identify customers before shipment, it must be because they were regarded as necessary factors in determining whether a sale is in interstate commerce or not.

View of District Court, Supra.—In the first ruling in 234 Fed. 152, *supra*, the question of the right of the Kansas Public Utilities Commission to control the rates of natural gas transported from another state is given very scant attention, and the Kansas Supreme Court is represented as declaring that this "gas was not of an interstate character." On the contrary, this court expressly declared that: "The transportation of natural gas from one state to another is interstate commerce must be conceded." In 245 Fed. 950 *supra*, however, the same judge presiding, it was said: "Now as to the question of interstate commerce * * * The question of storage has been presented and pressed with great earnestness as being a very important factor to be taken into consideration in determining this question of interstate commerce. But to my mind the evidence shows that such storage as exists is merely incidental to the transportation of the gas, and in fact it is a necessary incident to the proper and efficient transportation of the gas."

It may be true, that mere storage of gas may be an incident, but, if gas is taken out of storage and carried into pipe lines for indiscriminate distribution in a state, or if it is put into pipe lines for such distribution, the question becomes vastly different. The prior ruling was that the receiver was selling gas piped into another state and there delivered to parties in cities and towns of the latter state were sales in interstate commerce. Nothing is said about the use of the streets of the towns and cities or of the pipes laid there by virtue of franchises, but it is to be implied that there were franchises used for such purpose.

But there are cited a number of rulings to the effect that incidental storage, or that which aids transportation, is not material. I will take up these rulings in the order in which they are cited.

The first case is that of Kelly v. Rhoads,[16] That case showed that a herd of sheep was being driven from a point in Utah through Wyoming on their way to Nebraska. While en route they were suffered to spread out and graze over the land they passed over. The state of Wyoming attempted to impose a grazing tax on the herd. The court said: "The question to be determined is, whether the stock of the plaintiff was brought into the state *for the purpose of being grazed* at the time it was assessed for taxation." The court held that if only being driven through the state to a market "they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit." In this it does not appear that the herd was in course of being sold and delivered to any purchaser or that any state franchise was being resorted to to effectuate delivery.

The next case is that of Swift & Co. v. United States.[17] This case shows that as cattle were shipped with the expectation that their transit would end with their purchase in another state, and was done with only the interruption necessary to find a purchaser at the stockyards and this was shown to be a constantly recurring course, their purchase was but an incident in interstate commerce. Justice Holmes speaks of such interruption as "a typical, constantly recurring course," but interfering with "the current of commerce among the states." It was said also that the cattle in the stockyard were not at rest under the rule laid down in American Steel & Wire Co. v. Speed, 192 U. S. 500. That case held that

(16) 188 U. S. 1, 23 Sup. Ct. 259, 47 L. ed. 359.
(17) 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518.

goods brought in original packages and stored at a distributing point and subsequently to be delivered in the same packages to purchasers in various states are at rest in the state and are enjoying the protection of its laws, are taxable in the state. The goods were shipped to Memphis merely as a distributing point and thence to be sent on to customers on orders already taken. But the court thought that after the goods "had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose," this brought them under state jurisdiction.

The next case is Western Oil Co. v. Lipscomb, *supra*. The only thing that case decides is that where customers have been obtained on orders previously solicited, a shipment may be made in bulk to fill all the orders, the part sold to each may be drawn from a tank or container and this may be done for customers at one or more places of delivery, as designated destinations. It is the essential character of the commerce, not the accident of local or through bill of lading that is decisive." The movement in this case was not broken by its temporary stop at one of the places, where it had been destined for both places at the time of shipment and for customers with whom contracts were already made.

The next and last case is McFadden v. Ala. Gt. So. Ry. Co.,[18] a decision by Third Circuit Court of Appeals. In this case it appears that cotton intended for interstate transportation was shipped at a local rate to a place where it was to be compressed and from there rebilled to outside points. It was said: "The cotton was shipped upon an interstate rate to Birmingham, where it remained in possession and control of the carrier, subject to be divested by the defendants availing themselves of a provision in the bill of lading directing delivery to their order. This the defendants might have done but never did. Therefore, we are to determine the character of the transportation by what was intended * * * rather than what might have been done. * * * The stop in Birmingham was not the end of the journey, but was merely an interruption necessary to prepare the cotton for a journey to be continued.

In the Landon case citing those authorities, the journey had been ended and the question no longer remained one of storage, nor was there incident in further transportation to be considered. The only question was whether the gas was ready for delivery and what means should be used in delivery. If to customers not by contract previously secured there was no interstate carriage so far as they were concerned. If to deliver to customers secured by contract, could facilities only usable under local franchise be compelled without surrender of the owner to local jurisdiction? I think it plain that they could not.

N. C. COLLIER.

St. Louis, Mo.

(18) 241 Fed. 562, 154 C. C. A. 338.

LIABILITY INSURANCE—INTEREST.

CASEY-HEDGES CO. v. SOUTHWESTERN SURETY CO.

Supreme Court of Tennessee. Feb. 11, 1918.

201 S. W. 139.

Under policy, insuring against loss, where an appeal was taken from a judgment recovered against insured on the claim for personal injuries, the insurer was liable for the interest accruing on the portion of the judgment for which it was liable; such interest coming within the term "moneys expended in said defense," which by the policy were to be excluded from the limitation of liability.

GREEN, J. This suit was brought to recover a balance alleged to be due complainant on an employer's liability policy. There was a decree for the complainant below, from which defendant has appealed.

The complainant is a manufacturer in Chattanooga, and in 1912 obtained a liability policy from the defendant covering accidents to complainant's employes.

One J. R. Oiphant, an empoye of the complainant, sustained certain injuries in the

course of his work alleged to have been due to complainant's negligence, and brought suit for $25,000 damages in the District Court of the United States. Notice of this suit was given to defendant surety company, and the defense thereof was conducted jointly by the complainant and the surety company. There was a judgment in the District Court for $6,000. A writ of error was sued out in the name of the complainant, and the case carried to the Circuit Court of Appeals, where the judgment of the trial court was affirmed. 228 Fed. 636, 143 C. C. A. 158.

An effort was made to obtain a review of the case on certiorari, which was denied by the Supreme Court of the United States. Meanwhile an execution issued and was levied on property of the complainant to satisfy the judgment in favor of Oliphant and his costs and interest on said judgment pending the disposition of the writ of error by the Circuit Court of Appeals. This execution was paid off by the complainant.

The surety company paid to the Casey-Hedges Company the sum of $5,000, but denied liability for any part of Oliphant's costs recovered, and for any part of the interest which had accrued on the judgment of the District Court.

This bill was filed to recover the amount of Oliphant's costs and interest on $5,000 of judgment.

The principal controversy is with reference to the defendant's liability for any part of the interest which accrued on the judgment of the District Court.

It may be conceded that the greater number of adjudicated cases construing policies such as the one under consideration hold that interest on a judgment accruing during the time that an appeal therefrom is pending is not a part of the costs and expenses of the litigation in such a sense that it may be allowed in excess of the stipulated indemnity. Davison v. Maryland Cas. Co., 197 Mass. 167, 83 N. E. 407; Munro v. Maryland Cas. Co., supra; National, etc., Worsted Mills v. Frankfort, etc., Ins. Co., supra; Coast Lumber Co. v. Aetna Life Ins. Co., 22 Idaho, 264, 125 Pac. 185, and other cases collected in notes Ann. Cas. 1914D, 1067, and 43 L. R. A. (N. S.) 1128.

The question is undecided in this state, and with due deference we think that the view announced in the cases just cited is too narrow, and we are not inclined to follow these authorities.

Under the stipulations of the policy the insured has no control of the course of the litigation after the liability company undertakes the defense. Any interference on the part of the assured may forfeit his rights under the policy. He has no voice whatever in determining the propriety of an appeal. It would seem, therefore, that interest accruing during an appeal on so much of a judgment as the insurer was liable for should be borne by the insurer. To that extent the appeal is prosecuted for the benefit of the insurer.

It is said, however, that the whole matter rests in the domain of contract, and that it is competent for the parties to agree that the liability of the insurer shall be so much and no more. This is undoubtedly true, and the question should be determined on the contract made between the parties.

In the contract before us the insurance company undertook to respond to the extent of $5,000 for damages sustained by the assured on account of bodily injuries suffered by the insured's employe. The insurer also reserved the right to assume the management and defense of any suits brought to recover such damages against the insured, and, when it assumed the defense, undertook to defend at its own expense—the moneys expended in such defense not to be included in the limit of liability previously fixed.

The insurer not only agreed to reimburse the insured to the extent of $5,000 for loss sustained for damage claims, but also stipulated that it could conduct any suit, the defense of which it undertook, at its own expense.

The expense of the latter undertaking, therefore, is expressly excluded from the limitation of liability for damages on account of the accident.

Is the interest on that part of a judgment for which the insurer is ultimately liable accruing during the prosecution of an appeal, taken at the instance of the insurer, a part of the expense of the litigation or of the defense?

We think it is. The interest on a judgment during such period is fixed by law. It applies to every case and is taxed on every judgment which is not reversed in the appellate courts. It is incident to every appeal and part of the expense of every unsuccessful appeal. The prosecution of an appeal or a writ of error is a part of the defense, and expense so incurred is an expense of the defense. We can see no reason for excluding such an item from

the obligation of the policy to reimburse the assured for "moneys expended in said defense."

Such interest is commonly taken into consideration by counsel along with costs in advising about the propriety of appellate proceedings, and is reckoned as a possible expense of litigation.

This is the result reached by the Kentucky Court of Appeals in Aetna Life Ins. Co. v. Bowling Green Gaslight Co., supra. Such also appears to be the opinion of the Circuit Court of Appeals for the Sixth Circuit in New Amsterdam Cas. Co. v. Cumberland Telephone & Telegraph Co., 152 Fed. 961, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478. See, also, the dissenting opinion in Saratoga Trap Rock Co. v. Standard Acc. Ins. Co., 143 App. Div. 852, 128, N. Y. Supp. 822.

Responding to one of the arguments advanced by the courts disallowing a recovery of interest under such circumstances, the Kentucky Court said:

"An attempt, however, is made to distinguish between the items of damage and cost and the items of interest, and the argument is made that as the assured had the use of the $5,000 during the appeal, and as this use was worth the interest, therefore, this should not be accounted an expense, as the assured did not lose anything by paying the interest. But this argument overlooks the fact that the assured had to pay to the claimant the interest it now demands, and unless it recovers it from the insurance company, it will be out this item of expense incurred by the litigation. If the insurance company had paid the $5,000 when the judgment was rendered in the lower court, at which time the claimant first became entitled to interest that would have ended its liability under the policy. But this it refused to do, and now, unless it pays the interest that accrued on this $5,000 after that time and pending the appeal, the assured will lose it. The fact that the assured had the use of the $5,000 pending the appeal has nothing to do with who shall pay this interest; but if it did, the parties would be on an equal footing, because the insurance company also had the use of the $5,000 during the appeal. It is simply a question of which one should bear this item of expense, and we think the insurance company should."

In the case before us the writ of error seems to have been sued out with the consent of the insured. Both the insurer and insured joined in the prosecution of this writ of error in the Circuit Court of Appeals. The judgment affirmed was for $6,000. The insurer was liable for $5,000, or five-sixths of this judgment. The insurer is here seeking a recovery of five-sixths of the interest accrued and paid by it.

The chancellor pronounced a decree in favor of the complainant for the costs and five-sixths of the accrued interest paid by it, and this decree will be affirmed.

NOTE.—*Interest on Indemnity Policy After Judgment, Where Indemnitor Requires Appeal.*—In line with the instant case and greatly on like reasoning is Ravenswood Hospital v. Maryland Casualty Co., 280 Ill. 103, 117 N. E. 485, which case was noticed by this journal in 86 Cent. L. J. 2. The same cases in support of the opposite contention are cited there as in the instant case, and other cases also. In regard to interest on the judgment pending appeal being expense additional to the maximum stipulated to be paid, the Illinois court said: "Had appellant (the Indemnity Company) elected to pay the amount of this judgment to appellee, then liability for interest on its part would have ceased, and had appellee elected to prosecute the appeal it would have had the use of $5,000 paid to it by appellant during the time the appeal was pending. But appellant did not choose to do this, but on the contrary insisted upon the case being appealed to the Appellate Court. Under the terms of the policy appellee was compelled to participate in the appeal or forfeit its rights under the policy. While the case was pending in the Appellate Court interest accumulated on the judgment, which appellee ultimately was required to pay. In the meantime appellant retained and had the use of the $5,000 which ultimately was applied in satisfaction of the judgment, on which appellee was required to pay interest. The policy, as we have seen, reserved to appellant full control over the defense of such action, and in consideration thereof it agreed to defend such action at its own cost. The appellant does not contend but that this included all of the expenses necessary and incidental to the carrying of such case by appeal to the Appellate Court, such as the procuring of the record, abstracts, briefs and argument, attorney fees and court costs. Interest on a judgment is as much an incident to the expense of carrying a case to the Appellate Court as are the court costs."

In Century Realty Co. v. Frankfort-Maine Acc. & P. Co., 179 Mo. App. 123, 161 S. W. 624, the reasoning of the court proceeds in like way and a clause is quoted to the effect that if the company offers to pay the full amount of the policy it shall not be further bound "for any costs and expenses which the assured may incur in defending the same." This is argued to give the company an avenue of escape which it may take if it sees fit.

Further this court says that: "Construing this contract in its most favorable light in favor of the assured and having in mind the dual meaning of the word 'costs' and mindful of the word 'expenses' and the contracts as to their payment, we came to a consideration of the question as to the liability of the Frankfort Company for payment, not only of court costs, but of interest accruing between the date of the judgment, as originally entered and the payment thereof, payment having been suspended pending the determination of the case by the Supreme Court." So considering the matter it was concluded that the accruing interest was a liability of the company to the assured.

In Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503, an assured was held

entitled to recover from insurer the maximum of policy and interest from the time of its rendition. There is an elaborate discussion of the nature of the contract, and it appears that two dates for the running of interest are considered, one from the time the verdict was rendered and the other, more than a year later, when the assured paid the costs.

We think the trend is towards construction given in the cases cited. The same distinction pointed out in the instant case from those cited to the opposing view is stressed in the cases rejecting them. C.

ITEMS OF PROFESSIONAL INTEREST.

MEMORIAL ON REDUCING NUMBER AND LENGTH OF JUDICIAL OPINIONS.

The last meeting of the American Bar Association authorizes a memorial to the courts of the United States on the danger of accumulated precedents. The memorial was presented to the Pennsylvania Supreme Court on January 11, 1918, and the account of it in the Philadelphia Legal Intelligencer will not be without interest to the readers of this journal. Our contemporary says:

On the 11th inst., Russell Duane, Esq., who had been appointed by the President of the American Bar Association for the purpose, presented to the Supreme Court the "Memorial to the Courts of the United States and the Appellate Courts of the several States," prepared by the Committee on Reports and Digests.

This memorial calls attention to the great accumulation of authorities in America within the last thirty years, and suggests that such accumulated precedent becomes unwieldy and ultimately places in jeopardy "our whole theory of customary as distinguished from codified law, and may impair, if not destroy our doctrine of the sanctity of judicial precedent."

The memorial also suggests that the length of opinions may be materially reduced with advantage, and that certain "concrete steps" have so often been discussed that they may be treated as representing the common judgment of the profession. "These are: (a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness; (b) an avoidance of multiplied citations and the elaborate discussions of well-settled legal principles and of lengthy extracts from text-books and earlier opinions; (c) the presentation of so much, and no more, of the facts as are necessary to present the precise question at issue; (d) a reduction of the number of reasoned opinions, and a corresponding increase in the number of memorandum or *per curiam* decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities."

Chief Justice Brown said, on receiving the memorial:

"The Bar of this State, like the bar in every other State, is the mainstay of its appellate courts. The motion is approved by this court. It was a well-timed motion and will not be unheeded by this court."

HUMOR OF THE LAW.

An old Southern judge lost a mule for which he offered a reward. For days the whole neighborhood searched for that hybrid hawss without success. That reward was in demand. After everybody else had given up the idea of ever finding the animal, the town no-account came up the street one day leading the long lost Alack.

"How in the name of the pink-toed prophet did you ever find him, Ben?" asked the astounded jurist. "Well, suh, jedge, Ah'll tell yeh," said the Hookworm One. "Ah jes' asked mase'f whur would Ah go ef Ah was er mewl. An' Ah went. An' he had."

Judge Jas. G. Johnson, of Ohio, tells a story about an old Illinois or Iowa farmer, who had a very large estate. He had four boys. By his will he provided that the four boys should be executors and they should preserve the estate intact and pay their mother an income sufficient to keep her through her life, and at her death it should be divided among the boys. The boys did not agree upon the policy to be pursued; they disagreed and quarreled, and finally employed an attorney, and he was compelled to go to court for the purpose of settling matters. The youngest boy, a good-natured chap, was called into the lawyer's office one day in response to a request, and after he had answered a lot of questions pertaining to the affairs of the estate, he said: "I wish we could find some way that we wouldn't be all the time falling out about something; why, dog-gone it, I sometimes wish the old man hadn't died."

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1. **Adverse Possession**—Improvements.—Improvements by one in possession merely tends to show ownership of improvements, and is no evidence of ownership of land.—Chesapeake & O. Ry. Co. v. Rosskamp, Ky., 200 S. W. 496.

2.——Occasional Acts.—That predecessor in chain of title sought to be established by adverse possession occasionally cut timber from land is entitled to no weight in determining question of adverse possession.—Wilson v. Catron, Ky., 200 S. W. 459.

3. **Attachment**—Dissolution.—Giving to officer receipt in alternative for goods attached, executed by defendant and two others, dissolves attachment as to third persons, bona fide purchasers, or creditors making subsequent attachments; but as between attaching creditor, receiptors, and debtor, liability of officer continues until dissolved by law.—Stewart v. Stewart Drug Co., Me., 102 Atl. 823.

4. **Attorney and Client**—Attorney Fee. — Where one attorney in protracted litigation obstructed a compromise and another attorney concluded it, and where one litigant was paid an amount as indemnity for his debt for attorney's fees, the former attorney could not recover fee from litigant making such payment. —Ansley v. Concrete Construction & Contracting Co., La., 77 So. 774.

5.——Disbarment.—The offense of conspiring to smuggle opium into the United States in violation of federal law is ground for disbarment as involving moral turpitude within Code Civ. Proc., § 287, subd. 1.—In re Shepard, Cal., 170 Pac. 442.

6.——Unprofessional Conduct.—Making and filing by attorney of affidavit in pending proceeding charging judges with being corrupt and guilty of conspiracy is unprofessional conduct warranting disbarment under Code Civ. Proc., § 282.—Bar Ass'n of San Francisco v. Philbrook, Cal., 170 Pac. 440.

7. **Bankruptcy**—Adjudication. — Ordinarily, finding of fact by special master, to whom application for vacation of adjudication in bankruptcy was referred, will not be disturbed, when supported by evidence, yet, where facts are not in dispute, question may be considered by court, regardless of master's report.—In re S. & S. Mfg. & Sales Co., U. S. D. C., 246 Fed. 1005.

8.——Appointment of Trustee.—Attorneys for petitioning creditors may properly be appointed trustees for a bankrupt.—W. A. Liller Bldg. Co. v. Reynolds, U. S. C. C. A., 247 Fed. 90.

9.——Composition.—Composition by bankrupt with creditors should be rejected; the offer to creditors being before the bankrupt was examined in open court and had filed in court its schedules.—In re Berler Shoe Co., U. S. D. C., 246 Fed. 1018.

10.——Composition.—Any right against stockholders, because of a corporation issuing stock in exchange for property of inadequate value, belonging, under Stock Corporation Law N. Y., § 55, to the creditors, is unaffected by composition with creditors by the bankrupt corporation.—In re Berler Shoe Co., U. S. D. C., 246 Fed. 1018.

11.——Exemption.—That a family corporation, formed by an insolvent to take over his property to protect it from creditors, paid off valid judgments of a state court which were a lien on the property, does not render such property exempt from sale by the bankruptcy court.—W. A. Liller Bldg. Co. v. Reynolds, U. S. C. C. A., 247 Fed. 90.

12.——Preference.—A complaint by trustee, attacking warranty deed by corporation which subsequently became bankrupt, is insufficient to show that deed was voidable, as preferential, where it was not alleged that grantees had reasonable cause to believe that to enforce deed at time it became absolute would effect preference.—Hoshaw v. Cosgriff, U. S. C. C. A., 247 Fed. 22.

13.——Preference. — Where wife delivered corporate stock to her husband, which he pledged, and shortly before bankruptcy he paid the debt and recovered stock, which he delivered to his wife, held that transactions, being within four months of petition, was preferential, within Bankr. Act, § 60b.—Smith v. Tostevin, U. S. C. C. A., 247 Fed. 102.

14.——Preference.—Indorsers and guarantors of notes and obligations of a bankrupt are creditors within Bankruptcy Act, § 60, subd. b, relating to preferences.—Smith v. Coury, U. S. D. C., 247 Red. 168.

15.——Preference.—Whether mortgage was valid claim against bankrupt estate cannot be decided in suit by trustee against others to set aside conveyance as preferential and as in

fraud of creditors, those interested in the mortgage not being before court.—Smith v. Coury, U. S. D. C., 247 Fed. 168.

16.——Recording of Deed.—Where there was no subsequent purchaser before court, conveyance of Wyoming property more than four months before filing of involuntary petition in bankruptcy is not subject to attack as preferential, under Bankr. Act July 1, 1898, § 60, though not recorded more than four months before petition, Comp. St. Wyo. 1910, §§ 3653, 3654, requiring recording only to render deed effective as against subsequent purchaser.—Hoshaw v. Cosgriff, U. S. C. C. A., 247 Fed. 22.

17.——Selection of Trustee.—Where both parties went beyond what was proper in soliciting claims to vote on the selection of a trustee, the claims of one should not be disfranchised, and those of the other party allowed to be voted.—In re Parsons Mfg. Co., U. S. D. C., 247 Fed. 126.

18. **Banks and Banking**—Instructions. — In action against bank for conversion of note by "assistant secretary," it was error to submit question whether plaintiff left note with officer or agent of defendant, without requiring finding whether officer or agent had authority to receive note.—Fitzsimmons v. Commerce Trust Co., Mo., 200 S. W. 437.

19. **Bills and Notes**—Indorsement.—Where eight vendor's lien notes were sold to trust company, indorsed in blank and, notes being overdue, trust company sent four of them to bank for collection, purchaser of notes was affected with notice that person who sold them to trust company had parted with title, and her purchase did not affect priority of trust company's lien as to remaining four notes.—Bolding v. Bolding, Tex., 200 S. W. 587.

20.——Indorsement in Blank.—Where contract of suretyship or accommodation indorsement was signed in blank, plea merely denying all liability thereunder, was not an effort to explain intent of contract, as is permitted by Civ. Code 1910, § 5796, and does not set up good defense.—Pearce v. Swift & Co. Fertilizer Works, Ga., 94 S. E. 915.

21.——Pleading.—In action on note given for goods, plea that seller sent note to bank, and defendant had to sign and pay it before he could inspect goods, and had no opportunity of fully examining note, set up no defense.—Ducros v. People's Drug Store, Ga., 94 S. E. 897.

22. **Carriers of Goods**—Act of God.—Carmack Amendment does not change the common-law rule as to effect of act of God in excusing carrier from loss resulting proximately from it.—Barnet v. New York Cent. H. R. R. Co., N. Y., 118 N. E. 625, 222 N. Y. 195.

23.——Insurer.—A transfer company as a common carrier is an insurer of safe transportation and delivery of furniture, and is liable for all loss of or injury to the furniture, unless loss is caused by act of God, public enemy, public authority, nature of goods, or fault of shipper.—Merchants' Transfer Co. v. Kiser, Ky., 200 S. W. 454.

24.——Proximate Cause.—Carmack Amendment does not change the common-law rule as to effect of act of God in excusing carrier from loss resulting proximately from it.—Barnet v. New York Cent. & H. R. R. Co., N. Y., 118 N. E. 625, 222 N. Y. 195.

25. **Carriers of Passengers** — Contributory Negligence.—Operation of a motor vehicle in a municipality at a speed in excess of that allowed by Gen. Code Ohio, § 12604, is contributory negligence per se, and should be so declared in action for injuries to a passenger in car resulting from such operation.—Harmon v. Barber, U. S. C. C. A., 247 Fed. 1.

26.——Elevator in Building.—Where express delivery man rode on freight elevator, as required, in delivering packages to tenants of office building, held that relation of carrier and passenger existed.—O'Rourke v. Woodward, Ala., 77 So. 679.

27. **Chattel Mortgages**—Satisfaction of Record.—Mailing by chattel mortgagee to mortgagor written acknowledgment of full payment and release, with authorization of probate judge to enter the satisfaction on the record, and letter stating it would be necessary for mortgagor to send satisfaction to judge, was not compliance with Code 1907, § 4908, penalizing failure of mortgagee to enter satisfaction.—J. I. Case Threshing Mach. Co. v. McGuire, Ala., 77 So. 729.

28. **Constitutional Law** — Municipal Ordinance.—Ordinance forbidding bathing in lake within city limits from which water supply is drawn, but which is private property of owners of bordering lands, where city has acquired no right to water by purchase or eminent domain, is invalid as taking of property without due process of law.—Pounds v. Darling, Fla., 77 So. 666.

29. **Contracts**—Executory.—If contracts remain executory on both sides, the agreement of one to annul is consideration for agreement of other to annul, but where goods sold have been delivered, the agreement that the contract should not be binding, being without new consideration, is void.—Tacoma & Eastern Lumber Co. v. A. B. Field & Co., Wash., 170 Pac. 360.

30.——Impossible to Perform.—Contract to build mill on obligor's property is not "impossible" of performance, so as to excuse nonperformance, because it could not be profitably operated without vacation of streets.—Learned v. Holbrook, Ore., 170 Pac. 530.

31.——Intoxicated Party.—One who at time of making contract is completely intoxicated, may avoid it, notwithstanding that intoxication was voluntary, but not if he is only partially intoxicated—Glenn v. Martin, Ky., 200 S. W. 456.

32. **Corporations**—Foreign Corporation. — It cannot be claimed that a foreign corporation which has obtained a certificate from the secretary of state is not organized under the laws of the state, in any proceeding except a direct one by the state.—Milliken v. Security Trust Co., Ind., 118 N. E. 568.

33.——Ultra Vires.—Under agreement authorizing trustee to certify bonds of corporation when mortgages were assigned by it to trustee, acceptance of mortgages executed by the corporation itself for trust fund and certifying bonds against them would be beyond powers of trustee.—Conover v. Guarantee Trust Co., N. J., 102 Atl. 844.

34. **Covenants**—Restrictions.—A purchaser of lands subject to restrictive covenants was bound by the restrictions where he had at least constructive notice thereof by reason of his deed containing a covenant putting him upon inquiry.—Pearson v. Stafford, N. J., 102 Atl. 836.

35. **Deeds**—Condition Subsequent.—A condition in a conveyance providing that in the event that any creditors of the grantee sought to subject the lands to their debts, title should at once go to the grantee's children, was a valid enforceable condition.—Scott v. Ratliff, Ky., 200 S. W. 462.

36. **Dower**—Land in Another State.—Widow can claim nothing in Arkansas out of rents of husband's property in Ohio, under law of which widow is not entitled to rents out of realty of which she is to be endowed until after petition for assignment of dower has been filed in proper court.—Mayo v. Arkansas Valley Trust Co., Ark., 200 S. W. 505.

37. **Eminent Domain**—Public Use. — Ordinance forbidding bathing in lake within city limits, from which water supply is drawn, but which is private property of owners of bordering lands, where city has acquired no right to water by purchase or eminent domain, is invalid as taking of property without just compensation.—Pounds v. Darling, Fla., 77 So. 666.

38. **Estoppel**—Acquiescence.—Where executor discharged mortgage out of rents with acquiescence of widow and all parties in interest, using rent from mortgaged property pro tanto, and balance out of other rents, it was too late, in widow's action for dower, for either party to ask accounting of the funds so applied.—Mayo v. Arkansas Valley Trust Co., Ark., 200 S. W. 505.

39. **Evidence**—Admissibility.—In action for rent, evidence of oral agreement, contemporaneous with written lease, that latter should not take effect until landlord should install heating apparatus in and repair premises, could not be considered, if the installation and repairs were to be made during the term expressed in the written lease.—Roseff v. Beals, N. Y., 168 N. Y. S. 1042.

40. **False Pretenses**—Expression of Opinion. —Representations made to induce loan concerning financial ability of borrower and value of property conveyed as security, held not mere expressions of opinion when defendant knew prosecuting witness was relying thereon.—State v. Hooker, Wash., 170 Pac. 374.

41. **Frauds, Statute of**—Extrinsic Evidence. —In suit for specific performance of contract to sell lot, memorandum reading, "Received from Mr. B. D. Coppage two hundred dollars on account of purchase price ($5,000) of lot of Bellah estate on Delaware Ave. above Riverview Ave.," defense of statute of frauds being raised, extrinsic evidence was properly admitted to identify lot as described in memorandum.—Coppage v. Equitable Guarantee & Trust Co., Del., 102 Atl. 788.

42.——Guaranty.—Where, wishing to sell corporate stock defendant by indorsement on contract guaranteed agreement by his associate to sell for or purchase stock sold plaintiff, consideration of principal contract was sufficient to support contract of guaranty and take it without statute of rauds.—Miller v. Eubanks, Ala., 77 So. 740.

43. **Fraudulent Conveyances** — Voluntary Conveyance.—Conveyances of debtor to sister were fraudulent as against creditors and could not stand, where only claimed consideration was that debtor promised sister that if she undertook to support their mother he would compensate her, while amount of support did not appear.—American Surety Co. v. Conway, N. J., 102 Atl. 839.

44.——Voluntary Conveyance.—Under laws of New Jersey, voluntary conveyance is deemed fraudulent in law as to, and voidable at instance of, creditor whose debt existed at date of conveyance, irrespective of actual intention of grantor or grantee, or of former's solvency or insolvency at time of conveyance.—Baldwin v. Kingston, U. S. D. C., 247 Fed. 163.

45. **Gaming**—Gambling Machine.—Slot machine, showing player every time he played goods procured, consisting of package of chewing gum, and sometimes in addition two or more trade checks, held gambling machine prohibited by Ky. St., §§ 1960, 1967.—Wealch v. Commonwealth, Ky., 200 S. W. 371.

46. **Guaranty**—Alteration.—Where dates of notes were changed to postpone running of interest until makers actually received consideration, guarantor under written guaranty providing that any extension might be granted, was not discharged.—First Nat. Bank v. Spalding, Cal., 170 Pac. 407.

47.——Binding Contract.—A guaranty that a buyer of ore, "its successors and assigns," would pay for specified amounts of ore to be delivered, does not bind the guarantor as to ore delivered to receivers; the latter not being either "successors" or "assigns."—Hanna v. Florence Iron Co. of Wisconsin, N. Y., 118 N. E. 629.

48. **Guardian and Ward**—Notice of Trust.—Where guardian sold to bank corporate bonds registered in ward's name, it was duty of cashier to inquire as to his authority to make sale, and where he did not do so, bank was not a purchaser without notice, and might be required to account.—Hamilton v. People's Nat. Bank of Washington, Pa., 102 Atl. 877.

49. **Habeas Corpus**—Extradition.—In habeas corpus, where relator was sought to be extradited for an offense in another state, the court rightly refused to go into the sufficiency of the indictment in the other state, or the merits of the defense.—People ex rel. Goldfarb v. Gargan, N. Y., 168 N. Y. S. 1027.

50. **Homestead**—Absence of Head of Family. —Law will not deprive family, consisting of husband and wife, of homestead on ground that property is not occupied as such within intent of homestead law merely because husband and head of family is absent on business in another state or away temporarily for other reasons.—Watson v. Hulburt, Ore., 170 Pac. 541.

51. **Injunction**—Laches. — Where owner of land adjoining railroad for seven years after the railroad diverted a stream so as to cause seepage on the land, asserted no rights and sought no relief, her long delay precluded equitable intervention.—Oregon-Washington R. & Nav. Co. v. Reed, Ore., 170 Pac. 300.

52. **Innkeepers**—Loss by Guest.—A hotel which operates checkroom is liable for loss of overcoat as carrier is for goods, and stipulation on check that articles are left at owner's risk is unreasonable and void.—Maxwell Operating Co. v. Harper, Tenn., 200 S. W. 515.

53. **Insurance**—Classification of.—In its primary and ordinary meaning, "class" of life in-

surance policies signifies those policies issued (a) in same calendar year, (b) upon lives of persons of same age, and (c) on same plan of insurance.—Miller v. New York Life Ins. Co., Ky., 200 S. W. 482.

54.——Contract.—The master's contract to protect the servant absolutely from violence by strikers was not void as an insurance contract made without requisite formalities.—Hansen v. Dodwell Dock & Warehouse Co., Wash., 170 Pac. 346.

55.——Loss by Burglary.—Meaning of clause in burglary policy, requiring direct and affirmative evidence of loss, is to be determined by intention of parties as expressed in policy, considering subject-matter, character and purpose of contract.—Garner v. New Jersey Fidelity & Plate Glass Ins. Co., Mo., 200 S. W. 448.

56.——Renewal of Policy.—Where an authorized agent orally agreed to renewal of a policy and nothing was said about any change in the terms or the amount of premium, the terms of the new policy were presumed to be the same as those in the old.—Liverpool & London & Globe Ins. Co. v. Hinton, Miss., 77 So. 652.

57.——Subrogation.—Where insurer of safe transmission of registered packages indemnified sender, packages having been stolen, held that such insurer was subrogated to rights of sender, and moral obligation of United States to protect its patrons by recovering on bond of thieving employe will extend to insurer.—United States v. United States Fidelity & Guaranty Co., U. S. C. C. A., 247 Fed. 16.

58.——Waiver.—Where insured made no representations that he was owner of land upon which building insured was situated, held company by accepting risk and issuing policy without inquiry waived condition that policy should be void if building insured was not located upon ground owned by insured.—Gregerson v. Phenix Fire Ins. Co., Wash., 170 Pac. 331.

59.——Warranty in Application.—In absence of language in policy sufficient for purpose, incorporation in it of application does not make warranties of answers therein purporting to be representations only.—Merchants' Reserve Life Ins. Co. v. Richardson, Ind., 118 N. E. 576.

60. **Intoxicating Liquors**—Indictment and Information.—Information alleging that defendant druggist knew that grain alcohol sold was not to be used for chemical or mechanical purposes, and was not sold for such purpose, presented issue of defendant's good faith.—State v. Holland, Wash., 170 Pac. 332.

61. **Landlord and Tenant**—Cancellation of Lease.—Where tenant defaulted, the lease was not canceled by the issuance in summary proceedings to dispossss him of the precept or the making of the final order therein, in view of Code Civ. Proc., § 2253, providing that the issuing of the warrant for the removal of the tenant cancels the lease, where none was issued. —Cornwell v. Sanford, N. Y., 118 N. E. 620, 222 N. Y. 248.

62.——Lease.—Where landlord owned three corners of street intersection, covenant in lease to corner grocer that no "properties on the corner" of such streets would be let to another grocer, did not apply to store adjoining such tenant in same building but on different lot.—Fenton v. Crook, N. J., 102 Atl. 834.

63. **Lost Instruments**—Notice. — Where indorser of notes, given for garage property sold, indorsed another note in consideration of destruction of first two by buyer, who had possession and substituted forgeries, he had sufficient notice of infringement of seller's rights to put him on inquiry and to prevent his defeating his obligation.—Motley v. Darling, N. J., 102 Atl. 853.

64. **Marriage**—Deceit.—In action for deceit of defendant husband in marrying plaintiff while he was husband of another, plaintiff was not bound by financial condition of defendant as of date of discovery of fraud, and it was within court's discretion to fix compensation as of date of verdict.—Larson v. McMillan, Wash., 170 Pac. 324.

65. **Master and Servant**—Assumption of Risk. —Plaintiff held to have assumed risk of injury from cutting steel rails without goggles, and company not to be liable, danger being obvious, even though section foreman who assured him it was all right be treated as vice-principal.—Union Pac. R. Co. v. Marone, U. S. C. C. A., 246 Fed. 916.

66.——Direction of Verdict.—Where person injured by automobile, shows that the driver was in the employ of the owner, there is an inference that the servant was acting within the scope of his employment at the time of the injury, and the court cannot direct a verdict for defendant on that issue.—Penticost v. Massey, Ala., 77 So. 675.

67.——Presumption of Agency.—That a wife is driving an automobile owned by her husband with his express consent and permission raises the presumption that she was his agent, and makes a prima facie case against the husband in favor of one injured while she was driving the car.—McWhirter v. Fuller, Cal., 170 Pac. 417.

68.——Scope of Employment.—Indigent applicant, employed as teamster in municipal woodyard, held, when proceeding to remove household goods of indigent family, as directed by superintendent of yard, within scope of his employment, so that city would be liable for resulting injuries.—City of Oakland v. Industrial Acc. Commission of State of California, Cal., 170 Pac. 430.

69.——Unsafe Appliance.—Employer is liable in damages for injury to employe from employer's attempt to use an apparatus generally recognized by men of practical and expert knowledge to be of insufficient size or strength to stand strain to which it is put.—Haynes v. Fisher Oil Co., La., 77 So. 781.

70.——Warning.—A master was justified in considering a servant 40 years of age, who had worked around stagings, high steel towers, derricks, lumber, bridges and was a "rigger," as qualified to move timbers along cross-beams of a trestle work without warning him of the dangers thereof.—Murinelli v. T. Stewart & Son Co., Me., 102 Atl. 824.

71. **Mechanics' Liens**—Materialman.—Act No. 167 of 1912, giving in general terms a privilege upon "buildings" or "works" in favor of laborers, materialmen, etc., gives no privilege upon public property.—Red River Valley Bank & Trust Co. v. Louisiana Petrolithic Const. Co., La., 77 So. 763.

72. **Mortgages**—Evidence.—Where owner of land after contracts to sell parts thereof executed a mortgage thereon, and as further security assigned in trust the amounts unpaid on contracts, and the mortgagee sued to foreclose, making the purchasers, but not the trustee, parties, and the priority of the purchasers' right was established, it was error to hear evidence and make findings with reference to the amount of payments received by the trustee and to conclude that the mortgage as to the purchasers had been satisfied.—Seattle Trust Co. v. Cameron, Wash., 170 Pac. 379.

73. **Municipal Corporations** — Contributory Negligence.—Passenger seated on left side of open car, who looked up street as he arose to get off on right side, and walked around front of car to cross street without looking again, and was run down by automobile coming from rear, was guilty of contributory negligence.—Di Stephano v. Smith, R. I., 102 Atl. 817.

74.——Last Clear Chance.—Where plaintiff, starting across the street, saw defendant's automobile approaching, and became confused, which the chauffeur saw, but failed to stop, the doctrine of last clear chance applied, and it was for the jury whether the chauffeur's failure to stop was the proximate cause of the injury.—Underhill v. Stevenson, Wash., 170 Pac. 354.

75.——Right of Way.—One who changes his course at street intersection is not entitled to full benefit of an ordinance providing that automobile going north or south has right of way.—Clark v. Fotheringham, Wash., 170 Pac. 323.

76. **Navigable Waters**—Land Under Water.—State had right to grant land under waters of cove below low-water mark for any public use, when possible without substantial impairment of public interest and subject to paramount right of Congress to control navigation.—New York, N. H. & H. R. Co. v. Armstrong, Conn., 102 Atl. 791.

77. **Perpetuities**—Rule Against. —Will intending that one-third of trust estate, income of which was to have been paid to deceased son for life, should, on his death without children, vest in children of testatrix's surviving sons as class, held not to violate rule against perpetuities, or Act April 18, 1853 (P. L. 508), against accumulations.—In re McKeown's Estate, Pa., 102 Atl. 878.

78. **Pledge**—Commercial Paper.—Pledging of commercial paper as collateral for payment of debt, without special authority thereto, does not authorize pledgee to sell paper, at private or public sale, upon default in payment, but he must hold and collect it as it comes due and apply proceeds on debt.—Miller v. Horton, Okla., 170 Pac. 509.

79. **Principal and Agent**—Imputed Knowledge.—Purchaser of notes from trust company, through agent who knew company did not propose to sell, but was demanding payment from agent, who had assumed payment, was bound by knowledge of agent, and, as against rights of trust company, acquired nothing.—Bolding v. Bolding, Tex., 200 S. W. 587.

80.——Scope of Agency.—It is not within the apparent scope of authority of an agent employed to buy cattle on commission to contract for his principal with others to assist him, and to bind his principal for additional commission for such purchases.—Dawson & Young v. Nunn & Latham, Tex., 200 S. W. 603.

81. **Railroads**—Discovered Peril. — Where plaintiff was climbing between freight cars, and was injured by first movement of starting of train, to recover for discovered peril, it is necessary that engineer, fireman or brakeman giving signal to start knew of his perilous position.—Provo v. Spokane, P. & S. Ry. Co., Ore., 170 Pac. 522.

82.——Evidence.—In prosecution of railroad for failing to provide convenient and suitable men's privy at station, evidence for commonwealth that few persons in town had provided toilet facilities in their houses was admissible. —Louisville & N. R. Co. v. Commonwealth, Ky., 200 S. W. 464.

83.——Injunction.—Finding that predecessors of defendants, in railroad's suit to enjoin trespass on right of way occupied by trestle, if riparian owners, either have been compensated for strip occupied by railroad or have abandoned claim, held reasonable inference as to part of six-rod strip granted railroad for right of way at its option, over which railroad has in fact laid out tracks.—New York, N. H. & H. R. Co. v. Armstrong, Conn., 102 Atl. 791.

84.——Licensee.—Newsdealer and his assistant, who went upon premises of railroad company to obtain their newspapers, held licensees for whose benefit another railroad company, licensed to use right of way, was bound to exercise reasonable care.—Pennsylvania R. Co. v. Lackner, U. S. C. C. A., 246 Fed. 931.

85.——Licensee.—Where prospective passenger approached station along path on railroad's right of way of which it had not invited use as approach to station, intending passenger was merely licensee, to whom railroad owed no duty, except not to injure by positive negligence in operation of trains.—Bales v. Louisville & N. R. Co., Ky., 200 S. W. 471.

86.——Negligence.—It is negligence for railroad without warning to make flying switch of coal cars onto track whereon freight car is standing having people in it unloading to knowledge of railroad's servants.—Pearson v. Chicago, M. & St. P. Ry. Co., Mo., 200 S. W. 441.

87.——Ordinary Care.—Where decedent was driving a bus carrying passengers and drove upon the track, and was struck by a train, he did not owe to the railroad company the duty of keeping a lookout for the train, but owed only the duty of exercising ordinary care.—Chesapeake & O. Ry. Co. v. Williams' Adm'r, Ky., 200 S. W. 451.

88. **Receivers**—Appointment of.—If lawyer is appointed receiver, it is improper for him to employ another attorney, unless case is extraordinary and he has permission by special order to retain counsel.—Simpson v. Vitaphone Co., N. J., 102 Atl. 871.

89. **Release**—Construction of.—Where servant signed receipt of "$11 in full payment of amount due me to date," which showed number of hours he had worked, and the rate of wages per hour, without evidence that it was intended as a release from liability for injuries, it was proper to refuse instruction that, if the servant signed the receipt, verdict in action for injuries should be for the master.—Hansen v. Dodwell Dock & Warehouse Co., Wash., 170 Pac. 346.

90.——Obtaining a release from a servant by figuring the amount under the Employers' Liability Act, when the master had elected not to accept that act, and telling him that the amount he so figured was all he could get, the servant believing him, was actual fraud, defined by Civ. Code, § 1572, warranting rescission. —Carr v. Sacramento Clay Products Co., Cal., 170 Pac. 446.

91. **Sales**—Breach of Contract.—Plaintiff's failure to make further deliveries of flour contracted for will be excused by defendant's failure to pay for flour sold on open account; defendant's breach of agreement to pay for such flour amounting to a breach of entire contract. —J. C. Lysle Milling Co. v. North Alabama Grocery Co., Ala., 77 So. 748.

92.——Contract.—Where seller refused to deliver coal except at advance and did not, even at advanced price, delivered all coal contracted for, buyer may for coal not delivered recover difference between contract price and market price, but as to coal delivered may recover only difference between contract price and that paid. —Hencken & Willenbrock Co. v. Rosenwasser Bros., N. Y., 168 N. Y. S. 1097.

93.——Evidence.—For defendants to receive and sell flour shipped to them by plaintiff, and fail to furnish invoices or report sale as agreed, would be such an appropriation that plaintiff could treat its transaction with them as a sale, though not intended as such at time of shipment.—Richardton Roller Mills v. Miller, Wash., 170 Pac. 357.

94. **Street Railroads**—Evidence.—In action for death from negligence of street car company, findings that deceased's horse was in habit of taking fright at street cars and bolting, that deceased knew thereof, and that horse was reasonably safe, held not inconsistent with verdict for plaintiff.—Adams v. Iola Electric R. Co., Kan., 170 Pac. 395.

95. **Trust**—Evidence.—Where husband before marriage turned over money to his wife for her to save and invest for him, it is immaterial, in action to have a trust declared, whether the marriage was legal or not.—Cetenich v. Fuvich, R. I., 102 Atl. 817.

96.——Extraordinary Dividend.—So much of extraordinary dividends as are derived from or constitute distribution of capital, should be credited to capital, while part derived from distribution of profits accruing during lifetime of trust in shares of stock should be credited to income.—United States Trust Co. of New York v. Heye, N. Y., 168 N. Y. S. 1051.

97. **Vendor and Purchaser**—Abandonment of Contract.—Where the vendor of land mortgaged it after contracting to sell, and thereafter the purchasers accepted deeds in consummation of their contracts, there was no abandonment of the contracts, and all rights conferred by the contract were preserved.—Seattle Trust Co. v. Cameron, Wash., 170 Pac. 379.

98.——Deficiency.—Where the vendor overstated the acreage, the vendee could take the land actually conveyed and have compensation by abatement of the purchase money for the deficiency.—Manning v. Carter, Ala., 77 So. 744.

99. **Wills**—Construction.—Where will gave use of realty and declared that if devisee died "without leaving children" land should revert to estate and be divided among testator's other children, division was limited to such children living when devisee died.—Craig's Adm'r v. Williams, Ky., 200 S. W. 481.

100.——Capacity.—Where testator, 84 years of age, feeble in mind and body, was living with son to whom he left bulk of property at time of making of will, burden is on such son to show that there was no undue influence.—In re Tutty's Will, N. J., 102 Atl. 833.